STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	IN THE ELEVENTH JUDICIAL CIRCUIT
Joseph S. Dusenbury, Jr., Individually,	)	Civil Action No. 2014-CP-32-2160
Plaintiff,	)	
	)	
vs.	)	**ORDER GRANTING BAUKNIGHT'S MOTION FOR SUMMARY JUDGMENT**
Joseph S. Dusenbury, Jr., as Personal Representative of the Estate of Joseph S. Dusenbury, Sr., and Katherine Bauknight,	)	
Defendants.	)	

This matter is before me on the Motion for Summary Judgment and the Motion to Dismiss Complaint for Declaratory Relief or to treat such Complaint as a Motion for Summary Judgment filed by Defendant Katherine Bauknight ("Bauknight").[1] A hearing on the motions was held on July 8, 2015. After reviewing the submissions and arguments of counsel and for the reasons stated below, the Court hereby grants both of Bauknight's motions.

FACTS

Joseph S. Dusenbury, Sr. ("Mr. Dusenbury") died testate on December 23, 2008 with a will dated October 17, 2003. He had two heirs at the time of his death, his son Plaintiff Joe Dusenbury, Jr. ("Plaintiff") and his granddaughter, Katherine Bauknight. Bauknight is the only child of Cynthia Dusenbury Bauknight, the Dusenburys' daughter who predeceased them on September 11, 2003. Mr. Dusenbury's will was witnessed by his wife, Betty Dusenbury ("Mrs. Dusenbury"), who predeceased Mr. Dusenbury in 2007.[2] It was also witnessed by Angela

[1] Ms. Bauknight recently married and her married name is Katherine Bauknight Poore. For purposes of this Order, she will be referred to as Bauknight.

[2] Similar issues are present in Mrs. Dusenbury's estate, which is being litigated in a separate action, 2014-CP-32-4317.

Dusenbury, his daughter-in-law.[3] The will left the entirety of his estate to Betty Dusenbury in trust for her lifetime. Upon her death, the trust was to terminate with all income and principal paid to Plaintiff Joseph S. Dusenbury, Jr. ("Plaintiff").

On October 10, 2011, Bauknight filed a Petition for Appointment as Personal Representative. In her Petition, Bauknight named herself and Plaintiff as intestate heirs. Upon this filing, the Probate Court opened the file, C/A No. 2011-ES-32-01141. Plaintiff accepted service of the Petition and filed an Answer and Counterclaim. In his response, Plaintiff asserted he is "the sole heir and designated as the personal Representative. *See, Answer and Counterclaim* ¶ *2.* Plaintiff also filed an Application for Informal Probate of the Will and Informal Appointment naming him as the personal representative. In response to the assertions made in the Counterclaim that Plaintiff is the sole heir of Mr. Dusenbury's estate, Bauknight filed a Reply and asserted that if Plaintiff's share exceeded one half, it must be reduced as a result of the purging statute. *See* Reply ¶¶ 4-8. Specifically, in § 8, she prays that the Court deny the relief sought by the Respondent (i.e., "be named as the sole heir") and grant the relief sought by Petitioner (that Plaintiff's share be reduced per the purging statute.)

On June 11, 2012, Michael Brackett, counsel for Plaintiff at the time, sent Probate Judge Robert E. Peeler a letter cancelling a hearing on the naming of Plaintiff as personal representative. *See* **Exhibit A.** The letter further stated the parties intended "to meet to discuss the remaining issues in the estate..." On June 19, 2012, the Court issued an order (the "Consent Order") admitting the will formally to probate and naming Plaintiff as Personal Representative.

[3] Angela Dusenbury ("Angela") was married at the time of the execution of the will to Plaintiff Joseph S. Dusenbury, Jr., son of Mr. Dusenbury. Angela is no longer married to Plaintiff.

The Consent Order did not reference the issue concerning the purging statute raised in Bauknight's Reply, and that issue has not been resolved until the Court's ruling today.

On January 16, 2014, Plaintiff filed the Complaint for Declaratory Judgment in Probate Court in C/A No. 2011-ES-32-1141. Defendants are Bauknight and Joseph S. Dusenbury, Jr., as Personal Representative for the Estate of Joseph S. Dusenbury, Sr. Plaintiff seeks a declaratory judgment that the purging statute, S.C. Code Ann. § 62-2-504, is inapplicable to Mr. Dusenbury's will and does not limit Plaintiff's share of Mr. Dusenbury's estate.

On March 3, 2014, Judge Robert Peeler issued an Order transferring this matter to the Lexington County Circuit Court. Included in the removal are the unresolved issues raised in the Defendant's 2011 Answer and Counterclaim and Bauknight's Reply. Also, the Defendant's 2014 Complaint seeking a Declaratory Judgment and the subsequent pleadings were removed. Essentially, the Petition, Answer and Counterclaim, and Reply are one set of pending pleadings, and the Complaint for Declaratory Judgment created a new set of pleadings. However, all of these pleadings concerned the interpretation of the purging statute, related to the Estate of Mr. Dusenbury, were removed to the Circuit Court, and are pending.

Because the Court had not ruled on the issue related to the 2011 Petition, on April 3, 2014, Bauknight filed a Motion for Summary Judgment related to the 2011 Petition, Answer/Counterclaim, and Reply. This motion sought to limit the Plaintiff's share per the purging statute. In response to the 2014 Complaint for Declaratory Judgment, she also filed a Motion to Dismiss Complaint for Declaratory Relief or to treat such Complaint as Motion for Summary Judgment. This motion seeks dismissal of the Complaint for Declaratory Judgment. Both motions raise the same issues and both are before this Court.

LEGAL STANDARD

Motion for Summary Judgment:

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203. "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 198, 659 S.E.2d at 203.

Motion to Dismiss:

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, "a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Id.*

"A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." *Id.* "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id.*

ANALYSIS

I. This Court has jurisdiction over 2011 Reply and 2014 Complaint.

As an initial procedural matter, Plaintiff argues that the issues raised in Bauknight's Reply are no longer pending, and therefore, those issues were not transferred to the Circuit Court by the removal order and are not properly before this Court. The Court disagrees and finds that it has jurisdiction to hear matters raised in the 2011 Reply, as well as the same issues addressed in the 2014 Complaint for Declaratory Judgment.

Plaintiff argues that Bauknight's claim in her Reply that the purging statute be applied to Mr. Dusenbury's estate was ineffective because affirmative relief cannot be sought in a reply. To the contrary, it is "the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland Co. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (*quoting Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). "The designation of a pleading is not necessarily controlling." *Lane v. Home Ins. Co.*, 190 S.C. 84, 2 S.E.2d 30 (1939). "A counterclaim may be the subject of a reply in a proper case. Even if, for reasons of clarity and practicality, it might be better to treat the plaintiff's counterclaim in reply as an amendment to the complaint, such a counterclaim is permitted, if it arises out of the same transaction that is the subject matter of the defendant's counterclaim and therefore a compulsory counterclaim." 20 Am.Jur.2d *Counterclaim, Recoupment, Etc.* § 111 (2015). Additionally, Rule 8(f) of the South Carolina

Rules of Civil Procedure states and "[o]ur courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

Although Bauknight requested affirmative relief in her Reply, such relief is not invalidated simply because she did not caption the pleading as a counterclaim. A reading of Bauknight's Reply demonstrates it contains assertions as would be contained in a counterclaim although it is not so denominated. The Reply not only makes these assertions, but also seeks relief, just as a Counterclaim does.

Those claims made in Bauknight's Reply related to the purging statute are still pending and were not adjudicated by the Consent Order admitting the will to formal probate. The Consent Order does not address the issues raised in the Reply. It simply held that Mr. Dusenbury had a will and that will was being admitted to formal probate. The order specifically held that Bauknight and Plaintiff "are the only interested persons in this estate at present," thus contemplating the pending claims of the Reply. It was the contemplation of all parties that the issues raised by Bauknight would be addressed at a later time, as evidenced by the letter of Michael Brackett discussing "the remaining issues in the estate." *See* **Exhibit A.** Additionally, the Lexington County court website, of which this Court may take judicial notice, indicates that the Reply is part of the circuit court file. Accordingly, when the case was removed to the Circuit Court on March 3, 2014, the unresolved litigation was removed.

Even if the Plaintiff was correct that the issues raised in the Reply were not removed, the Plaintiff himself raised the same issues in his Complaint for Declaratory Judgment. Specifically, in Paragraph 8 he "seeks a declaration that S.C. Code Ann. § 62-2-504 is inapplicable or that application of such statute is time-barred in this instance." This is the precise issue previously

raised in Bauknight's Reply. Therefore, the issue regarding the applicability of the purging statute is presented squarely in a pleading which all parties agree is currently pending in Circuit Court. Even if the Consent Order ended the issues raised in the Reply, Plaintiff himself reopens those issues by expressly raising them in the Complaint for Declaratory Judgment in 2014.

Moreover, "[i]t is the primary function and duty of the courts, with respect to the construction of wills, to ascertain the intention of the testator as to the disposition of his or her property and, if that intention is legal, to carry it into effect." 80 Am.Jur.2d *Wills* § 976 (2015). The South Carolina Supreme Court has held that "[i]t is elementary that a testator's intention, as expressed in his will, governs the construction of it if not in conflict with law or public policy, and intent is to be ascertained upon consideration of the entire will." *In re Estate of Prioleau*, 361 S.C. 627, 631, 606 S.E.2d 769, 772 (2004); *see also White v. White*, 241 S.C. 181, 185, 127 S.E.2d 627, 629 (1962). Therefore, the probate court, or circuit court in properly removed cases, has a general duty to properly construe a will.

This duty is then specifically outlined for formal testacy proceedings in Section 62-3-411. "If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect." *See* S.C. Code Ann. § 62-3-411. The issue of whether Mr. Dusenbury's will is in conflict with the purging statute and whether a portion of his estate must pass by intestacy has been raised by Bauknight's Reply and Plaintiff's Complaint for Declaratory Judgment. Because of such pleadings and the Court's duty to not construe a will in conflict with a law or statute, this Court must carry out that duty and enter an order deciding the applicability of the purging statute on Mr. Dusenbury's will.

II. § 62-2-504 limits the Plaintiff's Share.

Now that it has been established that these issues are properly pending before this Court, Bauknight has moved that as a matter of law the purging statute applies and operates to limit Plaintiff's share of Mr. Dusenbury's estate. This Court agrees that construction of the will must yield to the purging statute. Plaintiff is barred from taking the entire residuary estate under his father's will because his wife at the time, Angela Dusenbury, was an interested subscribing witness to the will.

The "purging statute" is found in Section 62-2-504 of the South Carolina Probate Code. The statute explains the effect of interested witnesses signing a will:

> No subscribing witness to any will, testament, or codicil may be held incompetent to attest or prove the same by reason of any devise, legacy, or bequest therein in favor of such witness or the husband or wife of such witness, by reason of any appointment therein of such witness or the husband or wife of such witness to any office, trust, or duty, or by reason of any charge therein of debts to any part of the estate in favor of such witness as creditor. *Any such devise, legacy, or bequest is valid and effectual, if otherwise so, but unless there are two other and disinterested witnesses then so far as the property, estate, or interest so devised or bequeathed exceeds in value any property, estate, or interest to which such witness or the husband or wife of such witness would be entitled upon the failure to establish such will, testament, or codicil, such devise, legacy, or bequest is null and void to the extent of such excess.*

S.C. Code Ann. 62-2-504 (emphasis added).[4] Two disinterested witnesses are required to establish the will at death. If any devise or bequest in the will is "in favor of" a witness or witness's spouse, that witness is considered "interested." The Reporter's Comment following this section defines an "interested witness" as "an individual (1) who is named as a devisee in the

[4] The quoted statute language comes from the version of Section 62-2-504 in place at the time of Mr. Dusenbury's death. The statute was amended in 2013 to make it clear that a witness is deemed to be "interested" if that witness's issue will profit from the will. However, the witness's issue is not in controversy in this case, so the Court's analysis would be the same under both versions.

testator's will; (2) whose spouse is named as a devisee in the testator's will, or (3) whose issue are named as devisees n the testator's will."

The statute dictates that whether a witness is interested is determined at the time of death or "upon the failure to establish the will." *Id.* Once the determination has been made that a will does not have at least two disinterested witnesses, the statute purges the portion of the estate above and beyond what either the witness or the witness's spouse would have taken if the will was not established. The interested witness must be "purged" of the portion of the estate over and above what he/she would have taken if the will did not exist. *Id. See also Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946). The portion of the estate which is purged from the interested witness passes by intestacy, as if the testator did not have a will. *Id.*

Mr. Dusenbury's will was executed in October 2003. In his will, he left everything to his wife, Betty Dusenbury, to be held in trust as a life estate. Following her death, per the terms of the will, the trust would terminate and all remaining assets were to go to Plaintiff. Mr. Dusenbury's will was witnessed by Betty Dusenbury (his wife) and Angela Dusenbury (Plaintiff's wife at the time).

For purposes of the purging statute's effect on Mr. Dusenbury's will, both of the witnesses were interested subscribing witnesses. At the time of Mr. Dusenbury's death, Mrs. Dusenbury was already deceased, leaving Plaintiff, Angela's spouse, as the only beneficiary under his will. Plaintiff specifically pled in his complaint for Declaratory Judgment that he is the "sole devisee" under Mr. Dusenbury's will. *See* Complaint, § 1. Even if Mr. Dusenbury's assets initially transferred to a trust, Plaintiff was the sole beneficiary of the trust at the time of Mr. Dusenbury's death. Therefore, it is undisputed that the will was "in favor of" Plaintiff, and it is

undisputed that his wife witnessed the will, which then brings the purging statute into full force and effect because Angela was an interested witness.

Mr. Dusenbury's will itself is still valid. Instead, the otherwise valid devise making Plaintiff the sole contingent beneficiary was made invalid because Angela was an interested subscribing witness. According to the purging statute, the remedy for a will's lack of disinterested subscribing witnesses is to purge the interested witness or the witness's spouse of the devise they receive under the will in excess of what they would receive if the will did not exist. The devise, per the statute, passes by intestacy.

Because Angela, as Plaintiff's wife, was an interested subscribing witness, the devise to Plaintiff is "null and void to the extent of the value of the excess property...over the value of the property to which the witness [or] the witness's spouse would be entitled upon the failure to establish the will." S.C. Code Ann. 62-2-504(a). Plaintiff is permitted to take only what he would have taken under intestacy. "The voided portion of the devise shall pass by intestacy...provided the share of the interested witness, the witness's spouse, or the witness's issue shall not increase due to the devise passing by intestacy." *Id.*

If Mr. Dusenbury's will did not exist, his entire estate would have passed by intestacy to his two children and their issue. *See* S.C. Code Ann. 62-2-103(1). Plaintiff would have taken 50%, and the only living issue of Cynthia Bauknight, Katherine, would have taken the other 50%. Therefore, Plaintiff cannot take more than the 50% he would have taken if the will did not exist, and the devise to Plaintiff under the will, the entire estate, must be limited to 50%. *See Davis v. Davis*, 208 S.C. 182, 37 S.E.2d 530 (1946). After being purged of the voided excess devise, Plaintiff should receive half of Mr. Dusenbury's estate, and Katherine Bauknight should receive the remaining half.

For these reasons, Defendant's Motion for Summary Judgment and the Motion to Dismiss Complaint for Declaratory Relief or to treat such Complaint as a Motion for Summary Judgment are both granted. **IT IS SO ORDERED.**

The Honorable R. Knox McMahon
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina
~~July~~ Feb, ~~2015~~ 2016